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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ROBERT GUTIERREZ,

Plaintiff and Respondent,

v.

THE ODD FELLOWS HOMES OF
CALIFORNIA, INC.,

Defendant and Appellant.

A132836

(Napa County
Super. Ct. No. 26-49809)

I. INTRODUCTION

Defendant The Odd Fellows Homes of California, Inc., doing business as The Meadows of Napa Valley (hereafter The Meadows), appeals from several rulings on postverdict motions including: (1) granting plaintiff Robert Gutierrez's (hereafter Gutierrez) motion to tax costs; (2) granting Gutierrez's motion for attorney fees and postjudgment interest; and (3) denying The Meadows's motion to tax costs. The Meadows claims that it made a pretrial offer to compromise pursuant to Code of Civil Procedure section 998 (section 998), in the amount of \$22,001.00, plus reasonable attorney fees and costs, and that Gutierrez failed to obtain a more favorable judgment following trial. Therefore, The Meadows asserts that under the cost-shifting provisions of section 998, Gutierrez was not entitled to recover interest or attorney fees, and it, rather than Gutierrez, was entitled to an award of costs incurred from the time the offer was made. (§ 998, subd. (c)(1).)

We agree with the trial court that, although the jury's verdict was in the amount of \$21,270.88, for purposes of determining whether Gutierrez obtained a more favorable judgment under section 998, it was appropriate for the trial court to add to the jury's award statutory penalties of \$4,936.80 pursuant to Labor Code section 203. We disagree with the trial court, however, and conclude that at least a portion of the prejudgment interest of \$9,130.00 awarded to Gutierrez, should also have been added to the jury's verdict for the purpose of section 998 analysis. These sums are not "costs" within the meaning of section 998, subdivision (c)(2)(A), as contended by The Meadows. The addition of either amount to the jury's award exceeded the section 998 offer of \$22,001.00, thus warranting the trial court's rulings on the cost, postjudgment interest, and attorney fees motions.

Therefore, we affirm the judgment.

II. PROCEDURAL HISTORY

Gutierrez filed a complaint for damages and other civil relief in Napa County Superior Court on September 29, 2009, against his former employer, The Meadows, alleging causes of action for discrimination, retaliation for filing a complaint for sexual harassment, wrongful termination, and failure to pay overtime wages, plus meal and rest break wages. The complaint demanded, inter alia, compensatory and punitive damages, attorney fees and costs pursuant to Government Code section 12940, amounts for unpaid overtime wages and meal and rest breaks which were not made available to him pursuant to Business and Professions Code section 17200 et seq., and waiting time penalties and interest pursuant to Labor Code sections 203 and 218.6.¹

On October 4, 2010, before trial, The Meadows made a section 998 offer in the amount of \$22,001.00, "plus reasonable attorney fees and costs as of the date of the offer in an amount to be agreed upon by the parties or determined by the Court according to proof" The offer was not accepted by Gutierrez within the time allowed by statute.

¹ Although the face of the complaint references Labor Code section 218.5, it is clear from the record that attorney fees and interest were sought under Labor Code section 218.6.

Thereafter, the trial court granted Gutierrez's motion to bifurcate his Business and Professions Code section 17200 claim from the unpaid overtime, meal and break claims, thereby allowing the Business and Professions Code claim to be decided by the court after the jury decided the remaining issues submitted to it for decision.

The case went to a jury trial on May 9, 2011,² only on the overtime wages and holiday pay claims.³ The jury rendered its verdict on May 19, finding that The Meadows willfully had failed to pay Gutierrez overtime wages totaling \$11,685.00 in the calendar year 2006, \$8,332.20 for the 2007 calendar year, and holiday wages totaling \$1,253.68 for both years. The jury awarded no amounts to Gutierrez for his meal and rest break claims. Therefore, the jury's award totaled \$21,270.88.

After the jury's verdict, The Meadow filed a memorandum of costs seeking an award of costs totaling \$47,833.63. In the accompanying declaration, counsel averred that The Meadows was entitled to recover these costs because it had made a section 998 offer which had not been accepted, and because Gutierrez failed to obtain a more favorable result at trial.

Gutierrez filed a motion to tax costs challenging The Meadow's entitlement to costs, and opposing its core position that he had not obtained a more favorable result than that included in the section 998 offer. Gutierrez noted that the judgment was not yet final, and that once amounts sought by him from the court were added to the judgment, it would exceed the amount of appellant's section 998 offer.

On July 12, the trial court entered its "Ruling on Submitted Matters." As material to the issues on appeal, the court granted Gutierrez's motion to tax costs "in its entirety." In so ruling, the trial court concluded that "the interest award qualifies as a cost 'that is required to be awarded to the prevailing party pursuant to statute [Labor Code section 218.6] as an incident to prevailing in the action at trial.' (See . . . Code Civ. Proc.,

² All further dates are in the calendar year 2011 unless otherwise indicated.

³ Summary judgment was entered in favor of The Meadows on the discrimination, wrongful termination, and harassment claims, and that ruling is the subject of a separate appeal pending in this court (No. A132705).

§ 1033.5.) And, therefore, the interest award should not be considered in determining whether plaintiff received a more favorable judgment than the section 998 offer. [¶] The court is not persuaded, however, that the waiting time penalties awarded on account of the jury’s finding of willfulness in the failure to pay constitute an item that is required to be paid ‘as an incident to prevailing.’ The penalties, like the award of compensation, are part of the award, not incident to it. [¶] Because the jury’s award, plus waiting time penalties, exceeds [The Meadows]’s [section] 998 offer, the motion to tax is properly granted.”

On August 25, the trial court filed its decision relating to the bifurcated Business and Professions Code section 17200 claim. In it, the court refused to award any damages, concluding that it would amount to a double recovery given the jury’s verdict. However, the court did award Gutierrez interest in the amount of \$9,130.00, and waiting time penalties totaling \$4,936.80.

A “Final Judgment After Verdict and Decision” was filed on October 4, including the \$21,270.88 awarded by the jury, plus waiting time penalties of \$4,936.80 under Labor Code section 203, and interest in the amount of \$9,130.00 on the unpaid wages the jury awarded up to the date of the verdict, pursuant to Labor Code section 218.6. Thus, the total judgment entered was in the amount of \$35,337.68. Subsequently, the trial court added to the judgment an attorney fees award of \$158,822.85, postjudgment interest, and costs to Gutierrez totaling \$20,560.12.

A notice of appeal was timely filed by The Meadows appealing the court’s postverdict rulings.

III. LEGAL ANALYSIS

A. Overview of Section 998 and Standard of Review

The prevailing party in civil litigation generally may recover his or her costs from the nonprevailing party. (Code Civ. Proc., § 1032, subd. (b); *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333.) However, section 998 establishes a cost-shifting procedure that allows a nonprevailing party to recover costs when the prevailing party rejects a

reasonable pretrial settlement offer. (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764 (*Fassberg*).)

Where a section 998 offer is made by a defendant, if the plaintiff to whom it is made rejects the written settlement offer, and fails to obtain a more favorable judgment at trial, the plaintiff may not recover his or her postoffer costs, and must pay the defendant's postoffer costs, even if the plaintiff otherwise prevailed in the action. (§ 998, subd. (c)(1); *Fassberg, supra*, 152 Cal.App.4th at p. 764.) In addition under these circumstances, the court also may exercise discretion and order the plaintiff to pay the defendant's expert witness fees for trial and trial preparation. (§ 998, subd. (c)(1); *ibid.*)

Section 998 requires the offeror, here The Meadows, to make a sufficiently specific settlement offer so respondent may evaluate whether to accept it. (*Fassberg, supra*, 152 Cal.App.4th at p. 764.) "Any nonmonetary terms or conditions must be sufficiently certain and capable of valuation to allow the court to determine whether the judgment is more favorable than the offer. [Citations.]" (*Id.* at pp. 764-765.) The Meadows bears the burden to establish the offer satisfied these standards. (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727 (*Berg*); *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799 (*Barella*).) "To that end, a section 998 offer is construed strictly in favor of the party sought to be subjected to its operation. [Citations.]" (*Berg*, at p. 727; see also *Barella*, at p. 799.)

If the defendant's settlement offer includes costs, the judgment's value to the plaintiff includes the plaintiff's preoffer costs (and preoffer attorney fees if recoverable), but excludes the plaintiff's postoffer costs (and postoffer attorney fees). (§ 998, subd. (c)(2)(A); *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 330.)

As in this case, when the basic facts are not in dispute, we conduct a de novo review to determine whether a settlement offer is enforceable under section 998, and whether a plaintiff obtained a more favorable judgment. (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130; *Fassberg, supra*, 152 Cal.App.4th at p. 765.)

The Meadows's contentions on appeal rest on the notion that the waiting time penalties and the award of prejudgment interest were "costs" within the meaning of Code of Civil Procedure section 1033.5, subdivision (a), and thus were subsumed within its section 998 offer to the extent that offer included "reasonable attorney fees and costs" Because this contention necessarily requires this court to determine what constitutes a recoverable "cost" under section 1033.5, our standard of review as to these issues is *likewise de novo*. (*Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 597, fn. 4.)

B. Waiting Time Penalties Awarded Under Labor Code section 203 Are Not Costs Under Code of Civil Procedure section 1033.5, and Therefore Were Properly Added to the Jury's Award

As noted above, following the jury's verdict, the trial court determined that, in addition to the amount awarded by the jury, Gutierrez was also entitled to waiting time penalties of \$4,936.80 under Labor Code section 203. That section provides: "(a) If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.

"(b) Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise."

The purpose of Labor Code section 203 providing for a waiting time penalty is to ensure that an employer pays wages promptly. (*McCoy v. Superior Court* (2007) 157 Cal.App.4th 225.)

The Meadows argues that an award of waiting time penalties under Labor Code section 203 is a “cost” within the contemplation of Code of Civil Procedure section 1033.5. That statute enumerates items of expense that a prevailing party can recover as costs. After listing 13 specific items of costs, subdivision (a)(14), adds a provision as follows: “(14) Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.” (Code Civ. Proc., § 1033.5, subd. (a)(14).)

The Meadows seizes on this language and argues that because waiting time penalties had to be assessed once a finding was made that overtime wages were owed to Gutierrez, it was a cost awarded “ ‘incident to prevailing in the action at trial.’ ” We disagree for several reasons.

Firstly, Labor Code section 203 requires assessment of waiting time penalties only where the failure to pay was “willful[.]” The meaning of the term “willful[.]” as used in the statute, necessitates a finding that an employer has intentionally failed or refused to make the payments. (*FEI Enterprises, Inc. v. Yoon* (2011) 194 Cal.App.4th 790.)

While the employer’s refusal to pay need not be based on deliberate malevolence (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157), an employer’s good faith belief that no further wages are due and owing an employee who was discharged or who has voluntarily left employment is not willful. (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314.) Thus, when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee, the fact that the defense is ultimately unsuccessful will not preclude a finding that a good faith dispute existed. It is only where the defense is unsupported by any evidence, or it is found to be unreasonable, or was presented in bad faith, will a finding of a good faith dispute amount to a willful failure to pay. (*Alonzo v. Maximus, Inc.* (C.D.Cal. 2011) 832 F.Supp.2d 1122.)

Here the jury found that The Meadow’s failure to pay Gutierrez overtime and holiday pay was willful, triggering the trial court’s award of waiting time penalties under the statute. However, an award of overtime and holiday pay could have been made by

the jury without a finding of willfulness and without penalties under Labor Code section 203 being assessed. Accordingly, the imposition of this additional sum was not “incident” to the finding that Gutierrez was entitled to additional wages, and was not a cost.

In addition, wait time penalties are not in the character of a cost. Labor Code section 203 allows a lawsuit to be brought to recover penalties alone. Subdivision (b) of section 203 specifically provides: “(b) Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.” In fact, an action to recover waiting time wages is subject to the same statute of limitations as that applicable to an action for the unpaid wages from which the penalties arise, regardless of whether the claim for penalties is accompanied by a claim for unpaid final wages. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1398, disapproving *McCoy v. Superior Court*, *supra*, 157 Cal.App.4th 225.)

Thus, while a penalty under Labor Code section 203 may not be a “wage,” it cannot fairly be characterized as a “cost.” One may not sue to recover a cost. The Meadows has failed to cite a single case that equates the imposition of a statutory penalty to a cost under Code of Civil Procedure section 1033.5.

Furthermore, while the prevailing party is entitled to recover costs “ ‘as a matter of right,’ ” the awarding of individual items of cost is discretionary with the trial court. (*Goodman v. Lozano*, *supra*, 47 Cal.4th at p. 1333; *Correll v. Clark Equipment Co.* (1978) 76 Cal.App.3d 548.) Thus, under Code of Civil Procedure section 1033.5, issues of necessity, fairness, and reasonableness are factors a trial court may consider in deciding whether, and in what sum, a particular item of cost should be awarded. (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 986-987, disapproved on another ground in *Goodman v. Lozano*, at p. 1334.) Not so with statutory penalties under Labor Code section 203. Upon a finding of willfulness, wait time penalties are mandatory. (Lab. Code, § 203, subd. (a) [“the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced”].)

For all of these reasons, we conclude that the trial court was correct in adding the wait time penalties of \$4,936.80 awarded to Gutierrez to the jury's verdict, thereby increasing the total award to an amount greater than that offered by The Meadows in its section 998 offer. In so doing, it was not error for the court then to grant Gutierrez's motion to tax costs, and later to award him his costs of suit as the prevailing party under Code of Civil Procedure section 1032.

C. A Portion of the \$9,130.00 in Prejudgment Interest Awarded Under Labor Code section 218.6 Should Have Been Added to the Judgment For Purposes of Determining if The Meadows Was Entitled to the Benefit of the Cost-Shifting Provision of section 998

In addition to the wait time penalties assessed under Labor Code section 203, the trial court also awarded Gutierrez \$9,130.00 in prejudgment interest under Labor Code section 218.6. This amount included interest from the date Gutierrez was owed the wages until the jury's verdict was entered. However, the trial court refused to add this amount to the jury's verdict in determining if Gutierrez obtained a result more favorable than that contained in The Meadows's section 998 offer. In its "Ruling on Submitted Matters" filed on July 12, 2011, the court concluded as follows:

"The court agrees with defendant that the interest award qualifies as a cost 'that is required to be awarded to the prevailing party pursuant to statute [Labor Code section 218.6] as an incident to prevailing in the action at trial.' (See . . . Code Civ. Proc. § 1033.5.) And, therefore, the interest award should not be considered in determining whether plaintiff received a more favorable judgment than the section 998 offer."

Gutierrez argues on appeal that the interest awarded under Labor Code section 218.6 is not a "cost" within the contemplation of Code of Civil Procedure section 1033.5. Instead, interest in this context was a form of compensatory damages which should have been added to the jury's verdict in assessing whether The Meadows was entitled to the cost-shifting benefit of section 998.

Labor Code section 218.6 provides: "In any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which *shall accrue from*

the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2.” (Italics added.)

As it did with regard to the wait time penalties, The Meadows contends that prejudgment interest was an item of cost. Because it had offered to pay Gutierrez “reasonable attorney[] fees and costs” in addition to the cash amount of its section 998 offer, it argues the trial judge was correct in not adding the prejudgment interest to the amount to the jury’s award. In making this argument, The Meadows relies on *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1525-1526, fn. 14 (*Bodell*), to support its contention. Actually, *Bodell* is more supportive of Gutierrez’s position than that of The Meadows.

In *Bodell*, the State made a pretrial section 998 offer in the amount of \$525,000.00, plus “costs,” to settle Bodell’s breach of construction contract claim. Bodell did not accept the offer, and went on to obtain a jury award that was approximately \$128,000.00 less than the offer, excluding prejudgment interest. In a posttrial ruling, the trial court awarded Bodell \$397,000.00 in prejudgment interest under Civil Code section 3287, subdivision (a).⁴ Like here, the issue addressed by the appellate court was whether Bodell had obtained a result more favorable than the section 998 offer, focusing on the issue of whether the prejudgment interest was an item of compensatory damages or a cost to the prevailing party under section 998. (*Bodell, supra*, 62 Cal.App.4th at p. 1512.)

The appellate court concluded prejudgment interest under Civil Code section 3287, subdivision (a), was a form of compensatory damages. (*Bodell, supra*, 62

⁴ Subdivision (a) provides: “(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.”

Cal.App.4th at p. 1526.) Thus, the court rejected the State’s primary contention that all prejudgment interest under Civil Code section 3287 should not be added to the verdict: “However, we are not persuaded by the State’s initial contention that subdivision (c) should be interpreted so as to require that the entire award of prejudgment interest be excluded from the analysis. Subdivision (c) does not expressly exclude preoffer prejudgment interest awarded under Civil Code section 3287 (which is a form of compensatory damages, as we discussed above) from the ‘more favorable judgment’ analysis in contract cases.” (*Ibid.*, fn. omitted.)

The court went on to hold that, although interest under Civil Code section 3287, subdivision (a) was a form of compensatory damages, it would undercut the Legislative purpose of section 998 to allow postoffer interest to be added in determining whether the result achieved was more favorable than the State’s offer: “Because prejudgment interest that is recoverable under Civil Code section 3287, like attorney fees and ordinary court costs, continues to accrue until entry of judgment, plaintiffs and their counsel may be tempted to reject a defendant’s reasonable offer to compromise, hoping that the additional amount of prejudgment interest that will accrue before the case can be tried, when added to the jury’s award, will result in a judgment that is ‘more favorable’ than the rejected statutory offer. Such a result would enable a plaintiff to increase his or her recoverable compensatory damages while increasing the judgment in anticipation of avoiding the penalties set forth in section 998, subdivision (c). In our view, the construction of section 998, subdivision (c), which Bodell urges us to adopt (i.e., that all prejudgment interest awarded under Civil Code section 3287 should be included in the “ ‘more favorable judgment’ ” analysis) would defeat the legislative purpose of section 998 to encourage the settlement of lawsuits prior to trial.” (*Bodell, supra*, 62 Cal.App.4th at p. 1526.)

The court therefore concluded that *preoffer* interest was not a cost, while *postoffer* interest was a cost. Adding only that portion of prejudgment interest which accrued preoffer to the jury’s verdict, the total did not exceed the amount of the section 998 offer.

Therefore, the State, and not Bodell, was entitled to recover its costs. (*Bodell, supra*, 62 Cal.App.4th at p. 1513.)

We conclude that, like Civil Code section 3287, prejudgment interest awarded under Labor Code section 218.6 is a form of compensatory damages. Subdivision (b) of Civil Code section 3287 provides: “(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.” Although an award of prejudgment interest under Labor Code section 218.6 is mandatory, unpaid wages have been characterized as forms of payment due arising from contract, and an award of prejudgment interest under either statute bears a rate of 10 percent. (*Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1146.)

Consequently, in addition to the waiting time penalties awarded under Labor Code section 203, the trial court should also have added the preoffer amount of accrued interest awarded under Labor Code section 218.6. The jury awarded Gutierrez unpaid overtime and holiday wages for hours worked in 2006 and 2007,⁵ totaling \$21,270.88. The trial court added a total of \$9,130.00 in interest to the jury’s amount. Therefore, at a minimum, Gutierrez was entitled to have the interest awarded from July 2007 until The Meadows’s section 998 offer was made on October 4, 2010, added to the jury’s verdict in determining if he obtained a more favorable result than the offer. Without being precise, it is obvious that more than half the total prejudgment interest awarded under Labor Code section 218.6 accrued preoffer. Adding even half the amount of interest to the jury’s award, the aggregate exceeds The Meadows’s section 998 offer. Accordingly, for this

⁵ Specifically, the award was for \$11,685.00 and \$760.00 for the period March 12, 2006, until December 30, 2006, and \$8,332.30 and \$493.68 from December 31, 2006, to July 2, 2007.

additional reason it was proper to grant Gutierrez's motion to tax costs, and instead to award him his costs and attorney fees.⁶

IV. DISPOSITION

The judgment is affirmed. Gutierrez is entitled to recover his costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

SEPULVEDA, J.*

⁶ Because we affirm on these two grounds, it is unnecessary to reach the additional grounds asserted by Gutierrez in his respondent's brief on appeal he contends require affirmance.

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution..